

MAINE SUPREME JUDICIAL COURT

SITTING AS THE LAW COURT

Law Court Docket No. And-25-127

STATE OF MAINE v. TREVOR AVERILL

On Appeal from the Unified Criminal Docket (Androscoggin County)

**Reply Brief of Appellant
Trevor Averill**

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ARGUMENT

Pursuant to M.R. App. P. 7A(c), this Reply Brief only addresses the following new facts asserted or arguments raised in the brief of the Appellee: (1) that Averill waived his argument concerning the admissibility of the autopsy photographs at trial, thus precluding him from seeking appellate review, (2) the State’s reliance on *State v. Harding* with relation to prosecutorial error at closing, and (3) the State’s sentencing arguments.

1. Admissibility of Autopsy Photographs: Waiver.

The State contends that Averill waived his ability to challenge the admissibility of the autopsy photographs presented to the jury because he did not challenge their admissibility at the hearing held on the relevant motion in limine and because he withdrew his objections to Exhibits 3 & 4 at trial. (Red Br. 20-21.) Although the State is correct that trial counsel for Averill did respond “no” to the question posed by the trial judge of whether there was an objection to eighteen various exhibits—included in those eighteen exhibits were the challenged autopsy photographs—it is clear from the record that this issue was properly preserved for appellate review.

An issue raised on appeal is deemed to be preserved if there is a “sufficient basis in the record” to alert the trial court and the State to the existence of that issue. *See State v. Dolloff*, 2012 ME 130, ¶ 39, n. 11, 58 A.3d 1032. The purpose of this

preservation rule is to ensure that the trial court and the State have an opportunity to respond to the perceived error to avoid vacatur, and to assure that this Court has an appropriate record for review. *See State v. Dube*, 522 A.2d 904, 908-09 (Me. 1987). Further, “[w]hen a party presents an objection or an issue before trial by a motion in limine or similar device, and a court’s ruling against a party’s position is unconditional, the party’s objection may be deemed preserved even if not raised again at trial.” Alexander, *Maine Appellate Practice* § 402 at 237 (6th ed. 2022).

First, the trial judge’s ruling unconditionally denied Averill’s Motion in Limine concerning the autopsy photographs. Second, immediately before the *en masse* admission of eighteen exhibits, the State’s attorney indicated: “So I – I think we’ve said addressed all possible exhibits. But these photographs that we did litigate and *so our understanding is still subject to the prior objections.*” (Tr. III, p. 171) (Emphasis added.) Averill’s trial counsel responded: “*Yes.*” (Tr. III, p. 172) (Emphasis added.) All parties and the trial court were on notice about the objection to the admission of these photographs, and the purposes of the preservation rule have been satisfied on this record. In short, Averill’s challenge to the admissibility of the autopsy photographs is properly preserved, was not waived, and is subject to review by this Court under the abuse of discretion standard.

2. Prosecutorial Error: The State’s Reliance on *State v. Harding*.

Next, the State quotes *State v. Harding* to support the proposition that a prosecutor commits no error by “pointing out (if supported in the record) that an expert for the defense is being paid [because] [p]ayment can be a legitimate factor to explore for motive and bias.” 2024 ME 67, ¶ 22, n. 9, 322 A.3d 1175. However, the relied upon quote in *Harding* (importantly) continues on and explains: “Error arises when a prosecutor asserts that a defense expert is lying *because* the expert is being paid a fee” *Id.* Read in context with the trial prosecutor’s remarks to the jury at closing, the prosecutor was not simply pointing out to the jury a way to determine credibility (i.e., whether they were paid experts). Rather, the prosecutor asserted that Averill’s “story” was “implausible,” and, in the next breath, asserted that Averill “hired experts to support that implausible story.” (Tr. VIII, p. 82.)

Contrary to the State’s position, this argument is not consistent with or blessed by this Court’s footnote in *Harding*; it is prosecutorial error, and it was not, and could not, be properly mitigated by any instruction offered by the trial court. A mistrial was the only appropriate remedy under the circumstances for all of the reasons articulated in Averill’s principal brief. (Blue Br. 32-33.)

3. Sentencing: Standard of Review, Objective Factors, and Failure to Take Responsibility as an Aggravating Factor.

In appeals similarly situated to the present one, where this Court has granted an application for leave to appeal a sentence, this Court will “review de novo for misapplication of principle the basic sentence imposed at the first step fo the

analysis, and [will] review the maximum sentence and the final sentenced determined at steps two and three for an abuse of discretion.” *State v. Hansen*, 2020 ME 43, ¶¶10, 26, 228 A.3d 1082; *see also State v. Gaston*, 2021 ME 25, 250 A.3d 137.

The State contends that the sentencing court’s reliance on H.A.’s prior injuries, which were devoid of any evidence that could be attributed to Averill, was a proper factor to consider. True, that in determining the basic term the court “may take into account objective factors,” but those “objective factors include the age or other characteristics of the victim . . . and *the nature of the injuries inflicted*.” *See State v. Reese*, 2010 ME 30, ¶ 18, 991 A.2d 806 (emphasis added). The healing injuries that H.A. had sustained in the past could not be attributed by any witness to Averill; therefore, relying on these injuries was not “appropriately focused on the objective nature of [Averill’s] conduct,” who was being sentenced for Manslaughter that occurred on or about July 22, 2020. *See State v. Pelletier*, 2019 ME 92, ¶ 12, n. 4, 210 A.3d 177.

Furthermore, the State asserts that Averill has contorted the sentencing court’s remarks out of context to give the appearance of illegality. (Red Br. 37.) Appellant respectfully disagrees with this contention: the sentencing court plainly applied, as an aggravating factor, that Averill “has never taken responsibility for his actions.” Appellant agrees with the State that the sentencing court goes on to discuss the

statements Averill made to medical personnel and others, but that does not fully encapsulate the sentencing court's remarks. The sentencing court did not merely find that "Averill's affirmative statements and conduct [to responders] indicat[ed] a lack of remorse." (See Red Br. 38.) The trial court stated clearly that its sentence was based on Averill's failure to accept responsibility. Of course, the sentencing court did not explicitly reference Averill's election to stand trial and failure to plead guilty to the charge(s), similar to *State v. Moore*. See 2023 ME 18, ¶¶ 25-27, 290 A.3d 533. However, like in *State v. Ellis*, the sentencing court committed reversible error "when it found that Averill failed to take responsibility and considered that failure as an aggravating factor in his sentencing." 2025 ME 56, ¶¶ 29-30, 339 A.3d 794.

In step two of its sentencing analysis, the court found that Ellis failed to take responsibility for his conduct and considered that failure as an aggravating factor:

"Aggravating factors is the fact that firearms were brandished, although thankfully not used, but as I said, they certainly could have been. *A failure on the part of Mr. Ellis to take responsibility for his actions.... I find the aggravating factors significantly outweigh the mitigating factors present. And that's why the maximum sentence has gone up from 20 to 25.*"

Both parties acknowledge that, on this record, the sentencing court erred by considering Ellis's failure to take responsibility as an aggravating factor. We agree and take the opportunity to clarify when failure to take responsibility may be used as an aggravating sentencing factor.

Id. ¶ 21.

CONCLUSION

WHEREFORE, for the foregoing reasons, Appellant, Trevor Averill, renews his request that this Honorable Court vacate the conviction and remand this matter (1) with instructions to grant Averill's Motion for Judgment of Acquittal, (2) for a new trial, or (3) for re-sentencing.

Date: 11/25/2025

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CERTIFICATE OF SERVICE

I, Kurt C. Peterson, Attorney for the Appellant, Trevor Averill, hereby certify that this reply brief was filed and that the service requirements were complied with by copying opposing counsel on the email filing with the Court, and, upon approval of the email filing will be provided the required number of copies of this appellate brief pursuant to the Maine Rules of Appellate Procedure.

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